No. 78-1877

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRANK VISERTO, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 596 F. 2d 531.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1979. A petition for rehearing was denied on May 18, 1979. The petition for a writ of certiorari was filed on June 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge improperly admitted certain evidence in violation of Rule 404(b) of the Federal Rules of Evidence.

2. Whether the trial judge erred in giving the jury a supplemental instruction on the subject of constructive possession.

3. Whether petitioners' substantive convictions should be reversed on the ground that the indictment was duplicitous.

STATUTE INVOLVED

21 U.S.C. 841(a)(1) provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; * * *

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiring between January 1970 and September 1975 to distribute heroin and to possess that drug with intent to distribute it, in violation of 21 U.S.C. 846. Petitioners were also convicted on two substantive counts pertaining to separate quantities of heroin, each charging that petitioners distributed heroin and possessed heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioners were each sentenced to concurrent terms of 15 years' imprisonment plus a special parole term of 15 years on each count, and to fines of $25,000 on each count, totaling $75,000. The court of appeals affirmed the convictions (Pet. App. 1a-16a).

The government's case at trial relied primarily on the testimony of two co-conspirators, Charles Ford and

Norman Alexander. It was established that from 1970 through 1975 petitioners Viserto, Rocco, and Solce supplied heroin to Ford, who in turn distributed the heroin through a network of assistants, including Alexander (Pet. App. 3a-4a).

Ford met petitioners in early 1970, at which time he agreed to begin street distribution of heroin supplied by petitioner Viserto (Pet. App. 3a). Ford's operation proved successful. By September 1970 Ford had paid petitioner Viserto over $57,000 for heroin and was purchasing from him a half-kilogram quantity every six weeks at a price of $10,000 (*ibid.*). During 1971 Ford's distribution network continued to grow, so that by 1972 he was purchasing between three and eight kilograms at a time from Viserto (Pet. App. 4a). Ford estimated that he paid Viserto approximately $1 million for the heroin he purchased during 1972 (*ibid.*).

In 1973, after several meetings with petitioner Viserto and one with petitioners Rocco and Solce, Ford agreed to purchase 50 kilograms of heroin in a single shipment at a cost of $25,000 per kilogram (Pet. App. 4a). This heroin was sold by Ford's distribution ring in New York. The heroin was apparently of poor quality, and Ford fell behind in his payments to petitioners (*ibid.*). This occasioned a number of meetings with Viserto and Rocco in April or May 1975 at which Ford requested that he be given more heroin to sell in order to pay off his debt (*ibid.*). At one meeting, petitioner Rocco informed Ford that he and Viserto had ways of collecting their money (*ibid.*). Ford still owed approximately $250,000 when he ceased dealing with petitioners and left the New York area (*ibid.*).

ARGUMENT

1. Petitioners contend that the trial court admitted certain evidence contrary to the dictates of Rule 404(b) of the Federal Rules of Evidence (Pet. 10-15). The court of appeals properly rejected this contention as to each category of "other acts" evidence introduced (Pet. App. 6a-10a). Petitioners' contention that the court's decision conflicts with interpretations of Rule 404(b) by other circuits (Pet. 11-14) is without merit.

a. The admission of evidence that petitioners made substantial purchases for cash during the period of the conspiracy (Pet. 5-6, 14) was permissible under Rule 404(b). Evidence of cash expenditures was relevant to show that petitioners were engaged in an illegal business—the narcotics conspiracy. Proof of availability of large amounts of cash to an accused with no legitimate occupation has been held to be admissible because it tends to show that the cash was derived from "ill-gotten gains." See *United States* v. *Tramunti*, 513 F. 2d 1087, 1105 (2d Cir.), cert. denied, 423 U.S. 832 (1975). As the court below held, "[s]ince there was no affirmative evidence that the cash was derived from legitimate business, there was sufficient relevance to the crime charged for the consideration of the jury"[1] (Pet. App. 7a). Admission of this evidence was a proper exercise of the trial court's discretion.

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[1]Petitioners also suggest (Pet. 14) that this evidence should not have been admitted without also admitting the fact that petitioners were acquitted of tax evasion charges where the evidence of cash transactions was also introduced. This suggestion is without merit. That judgment of acquittal did not necessarily decide that the cash in question was not derived from the narcotics business. In any event, it was not necessary to make the evidence relevant and admissible at this trial, that, standing alone, it establish petitioners' involvement in

b. The trial judge also acted properly in admitting testimony by Ford that when his lieutenants asked him to provide them with guns, he obtained handguns from petitioner Viserto, which he distributed to his confederates (Pet. 6, 13-14). This was not admitted simply as evidence of "bad character"; it was an action in furtherance of the conspiracy and relevant to the crimes charged. As the court of appeals stated: "The evidence was significant, if Ford was believed, in linking [petitioner] Viserto to the conspiracy and showing its scope" (Pet. App. 8a). Moreover, it has been recognized that guns are standard tools of the narcotics trade. See *United States* v. *Wiener*, 534 F. 2d 15, 18 (2d Cir.), cert. denied, 429 U.S. 820 (1976).[2] Any possible prejudice was eliminated when the court gave a limiting instruction reminding the jury that no gun charges were involved.

c. Petitioners also challenge as a violation of Rule 404(b) the admission of the testimony of a police officer who overheard two conversations on October 6, 1977, several days after the return of the indictment, which involved petitioners Rocco and Viserto and related to heroin dealings extending back to the period of the

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the narcotics business beyond a reasonable doubt; accordingly, the possible finding of the first jury that the money did not, beyond a reasonable doubt, constitute narcotics proceeds would create no collateral estoppel against its use in this trial.

[2]Contrary to petitioners' contention (Pet. 14), *United States* v. *Warledo*, 557 F. 2d 721 (10th Cir. 1977), is not inconsistent with this case. In *Warledo* the court found that it was improper to admit into evidence a rifle that had been seized from the defendant after his indictment, where the government conceded that the weapon was not relevant to the crime charged.

charged conspiracy (Pet. 6-7, 15).[3] No objection on this ground was made at trial (Pet. App. 9a), however, and petitioners should not be permitted to object at this time. See *United States* v. *Fuentes*, 563 F. 2d 527, 531 (2d Cir.), cert. denied, 434 U.S. 959 (1977). Moreover, whether or not these conversations related to acts that were part of the charged conspiracy, large-scale narcotics distribution is a business, and evidence that petitioners Viserto and Rocco were engaged in that business is relevant evidence. It is clearly probative of more than "bad character."

2. Petitioners also contend that the trial judge erred in giving a supplemental charge to the jury on the subject of constructive possession (Pet. 15-17).

During the course of its deliberations the jury sent a note to the court requesting additional instructions on one of the substantive counts[4] (Tr. 3294). After a colloquy with counsel concerning the meaning of the note, the trial judge decided that it was best read as a request to restate the essential elements of the crime and to define the various terms in the charge. The prosecutor suggested that a charge on actual and constructive possession, which had not been included in the original charge, would be

[3]In the first conversation, one Paul Caiano told petitioner Viserto, "we can't lose him as a customer, we have to make it up to him," and petitioner Viserto replied "All right, don't worry" (Pet. App. 9a). The second conversation occurred between petitioners Viserto and Rocco in which the latter referred to a "customer" who had been purchasing for the last five years at a rate of $25,000 a "key" but with whom they were now having trouble (*ibid.*).

[4]The note read: "We want to hear your charge on this Count [Two]. We would like to hear the law on circumstantial evidence in regard to the verdict so all jurors have this clear in their minds" (Tr. 3294).

appropriate (Tr. 3299). The trial judge then inquired of the jury whether it desired a definition of possession, and one juror responded affirmatively (Tr. 3305). The charge then given by the district court contained a list of the elements of the crime charged, a definition of terms, an explanation of the statute of limitations,[5] the standard definition of possession, and a restatement of the charge on circumstantial evidence as requested by the jury (Tr. 3309-3315). The charge reiterated the "reasonable doubt" standard (Tr. 3311, 3315).

The charge was responsive to the jury's request, and petitioners do not contend that it incorrectly stated the law. Petitioners had an opportunity to argue the issue of possession in their closing arguments and took advantage of that opportunity. As the court of appeals stated: "The charge on constructive possession thus in no way deviated from the path of trial that the parties had already pursued" (Pet. App. 13a). Petitioners' right to summation was in no way prejudiced by the court's proper instruction. Rule 30 of the Federal Rules of Criminal Procedure cannot be read to prohibit the court from giving supplementary instructions to the jury when clarification is requested.

3. Finally, petitioners also urge that their substantive convictions should be reversed on the ground that Counts Two and Three were each duplicitous in charging two separate offenses—both distribution of heroin and

[5]One defense counsel had suggested that the jury be instructed regarding the application of the statute of limitations to the substantive counts (Tr. 3301). Following the same procedure undertaken with regard to the possession instruction, the trial judge inquired of the jury whether it wished to hear the statute of limitations charge (Tr. 3305). Again at the request of one juror, the instruction was given (Tr. 3310-3311).

possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Pet. 18-20). While we agree with petitioners that Section 841(a)(1) does establish separate offenses of distribution and possession with intent to distribute, which should be separately charged (see Rule 8(a), Fed. R. Crim. P.), it is nonetheless clear that the court of appeals properly refused to reverse their convictions on this ground.[6] Since the alleged duplicitous character of the counts was apparent on the face of the indictment, petitioners waived their right to object to any defect by failing to make an appropriate motion prior to trial, as required by Rule 12(b)(2) of the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 12(f). See *United States* v. *Droms*, 566 F. 2d 361, 363 (2d Cir. 1977); *United States* v. *Untiedt*, 493 F. 2d 1056, 1059 n.3 (8th Cir. 1974); *United States* v. *Harbin*, 377 F. 2d 78 (4th Cir. 1967).

There is no danger here that the jury verdict did not reflect unanimity. In most cases, the same evidence shows

[6]Two other courts have agreed with the position of the court below that these two offenses may properly be charged in one count. *United States* v. *Orzechowski*, 547 F. 2d 978, 985-987 (7th Cir. 1976), cert. denied, 431 U.S. 906 (1977); *United States* v. *Herbert*, 502 F. 2d 890, 893-894 (10th Cir. 1974), cert. denied, 420 U.S. 931 (1975). Other courts of appeals have approved charging these two offenses in separate counts, so long as cumulative punishment is not imposed where the same evidence shows both the distribution and possession with intent to distribute. See *United States* v. *Henciar*, 568 F. 2d 489, 492 (6th Cir. 1977); *United States* v. *Oropeza*, 564 F. 2d 316, 323-324 (9th Cir. 1977); *United States* v. *Stevens*, 521 F. 2d 334 (6th Cir. 1975); *United States* v. *Atkinson*, 512 F. 2d 1235 (4th Cir. 1975); see also *United States* v. *Cecil*, No. 78-1919 (10th Cir. March 8, 1979), petition for cert. pending, No. 78-1661. In this case, however, even assuming that the offenses should have been charged in separate counts, the defect is not grounds for reversal.

both distribution and possession,[7] so that a finding by the jury that a defendant is guilty of distribution necessarily carries with it a finding that the defendant is guilty of possession with intent to distribute. Thus, charging the two offenses in one count cannot possibly prejudice the defendant. Here, the same evidence was introduced to show the distribution and the possession, so it is clear that all members of the jury must have found petitioners guilty of possession with intent to distribute. Moreover, as the court of appeals pointed out, any risk that the jury's verdict on the substantive counts would reflect divided opinions among the jurors as to the offenses shown by the evidence was eliminated by the fact that the trial court "charged only the elements of possession with intent to distribute and did not charge at all the elements of 'distributing' " (Pet. App. 12a; see Tr. 3128-3129).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Where, unlike here, the defendant simply aids and abets someone who independently has possession of the narcotics and the defendant bears no responsibility for that possession, (for example, where he simply acts as a broker in finding a buyer), he may be guilty of distribution but not of possession with intent to distribute. See *United States* v. *Cecil*, *supra*.

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